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MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1519

CEICEL D. BROWN and WILLIAM D. BROWN,
Petitioners,

vs.

THOMAS P. SCOTT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

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INDEX

Petition for Rehearing 1

Grounds for Rehearing 2-6

New Decisions—

Due Process 2-3

Rule 8(c) Fed.R.Civ.P. 3

Rule 8(f) Fed.R.Civ.P. 3-4

Substantial Grounds Available to Petitioners Not Previously Submitted 4-6

Conclusion 7

Alphabetical Index of Authorities Cited

Dempsey & Associates v. *S. S. Sea Star,* 321 F.Supp. 663 (S.D.N.Y. 1970), 461 F.2d 1009 (1972) (Adv. sheet #3) 5

Groppi v. *Leslie,* ..... U.S. ....., 30 L.Ed.2d 632 (Adv. sheet #6), 92 S.Ct. 2

Trio Process Corp. v. *L. Goldstein's Sons, Inc.,* 461 F.2d 66, 74 (3d Cir. 1972) (Adv. sheet #1, 8-28-72) 3

58 C.J.S. Money Lent, Sec. 7, p. 883 4

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PETITION FOR REHEARING

Petitioners present their petition for a rehearing of this Court's order dated October 10, 1972, denying the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and, in support thereof, respectfully show:

GROUNDS FOR REHEARING

The decision below is in conflict with every decision of the Federal Courts which petitioners have been able to find reported since the filing of this petition for writ of certiorari upon the questions here involved.

Due Process—Petitioners have found one case involving due process, which is *Groppi* v. *Leslie*, ... U.S. ....., 30 L.Ed.2d 632 (Adv. sheet #6), 92 S.Ct. .....: In this case the Wisconsin State Assembly cited the petitioner for contempt and directed his confinement in jail without notice or an opportunity to be heard. There this Court said:

> "(9) * * * Indeed, we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.' (Citing cases) *We have emphasized this fundamental principle where rights of less standing than personal liberty were at stake.* (Emphasis added) E. G. Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L.Ed.2d 349, 89 S. Ct. 1820 (1969); Morgan v. United States, 304 U.S. 1, 18, 82 L.Ed. 1129, 1132, 58 S. Ct. 773 (1938); Grannis v. Ordean, 234 U.S. 385, 394, 58 L.Ed. 1363, 1368, 34 S. Ct. 779 (1914). In Mullane v. Central Hanover Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S. Ct. 652 (1950), the Court stated:
>
> > 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' 339 U.S. at 314, 94 L.Ed. at 872."

In the instant case petitioners had no notice of or opportunity to defend against the affirmative defense of gift, although they tried in every way they knew to learn what defense, if any, the respondent relied upon.

Rule 8(c) Fed.R.Civ.P., Affirmative Defense. Petitioners have found only one new decision relative to the sufficiency of an answer to permit an affirmative defense, which is *Trio Process Corp.* v. *L. Goldstein's Sons, Inc.*, 461 F.2d 66, 74 (3d Cir. 1972) (Adv. Sheet #1, 8-28-72), which involved the validity of a patent. There the court said:

> "(10) In its brief to this court, Goldstein says that the patent should be held invalid because of late claiming under 35 U.S.C. Sec. 132, and unenforceable because Trio misused the patent in a variety of respects. However, late claiming and misuse are affirmative defenses which must be pleaded and proved. 35 U.S.C. Sec. 272 (1970). Because Goldstein's answer to the complaint did not raise those issues, we hold those defenses to have been waived under Rule 8(c) Fed.R.Civ.P., and need not consider them further."

Yet, in the instant case, respondent was permitted, over the objection of petitioners, to present and prevail upon the affirmative defense of gift when his answer only denied that he was "in any way indebted to plaintiffs."

Rule 8(f) Fed.R.Civ.P., Construction of Pleadings. There has been a number of recent decisions under Rule 8(f), however, each of them involved complaints ineptly drawn by untrained plaintiffs themselves, and in each it was held that while, under Rule 8(f) a pro se complaint was entitled to liberal construction, the complaint must state a claim upon which relief could be granted and show

that there was a basis for federal court jurisdiction, as required by Rule 8(a). In the case at bar the trial judge does not give us any information as to how he arrived at the conclusion that the answer complied with the provisions of Rule 8(b) and (c), Rule 9(b) and Rule 12(b), any more than he gives us any information as to how he knew the attorney Courtney C. Crouch, of the firm of Crouch, Blair, Cypert & Waters, was interested in this case and why he sent Mr. Crouch copies of all letters and rulings, and required petitioners to serve copies of all papers upon him.

The Decision Below Is Against the Evidence and the Weight of the Evidence. Petitioners did not present in their petition for writ of certiorari, as grounds for review, that the decision below is against the evidence, and the weight of the evidence, but this is true as is clearly shown by the record filed herein. Although defendant (respondent) denied under oath in his response to petitioners' requests for admission of facts, that he received the proceeds of the cashier's check and two bank money orders bearing his endorsement, and which were introduced by petitioners as the instruments by which the loans were made, petitioners proved beyond question that the moneys were delivered to him by their legator, Burkett, in the amounts and on the dates alleged, and in his testimony at the hearing defendant admitted that he did receive the money, and admitted that Burkett was not indebted to him at the time the moneys were delivered to him, and that he had not repaid the amounts. This proved prima facie case. 58 C.J.S., Money Lent, Sec. 7, d, p. 883. Defendant did not, either in his pleadings or in his testimony, deny that the moneys were loaned to him as alleged. He did testify that sometime in the early part of May, Burkett gave him $15,000.00, but did not give the date or identify the bank money order

by which the petitioners showed the money alleged loaned to defendant on May 5, 1969, was delivered to defendant, as the check by which that alleged gift was made. He further testified that sometime in the latter part of August Burkett gave him a considerable amount of money by two checks, but he did not give the date or the amount of that alleged gift, or identify the cashier's check and bank money order offered in evidence by petitioners as the instruments by which the loan was made on August 26, 1969, as the checks by which that alleged gift was made. We submit there is absolutely nothing in the record in this case which even tends to rebut plaintiffs' prima facie case that the loans were made in the amounts and on the dates alleged and that they have not been repaid.

Dempsey & Associates v. *S. S. Sea Star*, 321 F.Supp. 663 (S.D.N.Y. 1970), 461 F.2d 1009 (1972) (Adv. sheet #3, 9-11-72).

> "(8) Once a prima facie case has been established, the burden of proof is on the defendants to establish that the damage was not due to their negligence. * * * Diado Line v. Thomas P. Gonzales Corp., supra, 299 F.2d 669 (9th Cir. 1962); Mamiye Bros. v. Barber Steamship Lines, Inc., supra, 241 F.Supp. 99 (S.D.N.Y. 1965), Aff'd 360 F.2d 774 (2d Cir.), cert. denied 385 U.S. 835, 87 S. Ct. 80, 17 L.Ed.2d 70 (1966); American Tobacco Co. v. Katingo Hadjipatera, 194 F.2d 449 (2d Cir. 1951), cert. denied 343 U.S. 978, 72 S. Ct. 1076, 96 L.Ed. 1370 (1952).
>
> "(9) Judge Bonsal found that, with the exception of the rust, defendants failed to rebut plaintiff's prima facie case. We hold that there was ample evidence to support this finding, and we affirm it."

Petitioners realize that the courts do not generally view property rights as having the same standing as the right to personal liberty, and also realize that property without liberty has very little value, but we submit that liberty without property is, at best, a mixed blessing. Many contend that the current breakdown in law and order in our country is largely due to the fact that our courts have disregarded the law and we have become a government of men and not a government of laws. If this Court declines to review this case, then petitioners have been subjected to the rule of one man, in complete disregard of all applicable law, including the Federal Constitution, and all prior decisions of this Court and the several courts of appeal. We respectfully submit that this is a dangerous precedent to establish. While it is frequently said that denial of certiorari does not constitute an expression on the merits, still it is quite generally so considered and cases where certiorari has been denied followed; and even if not considered as an expression on the merits it must be taken as an opinion that the errors committed, if any, are so minor as not to merit this Court's consideration. Petitioners hope and believe that most of the judges composing our courts will continue to follow the law, equity and justice; still, if one judge has disregarded the law and this Court declines to do anything to correct it, then others may, and probably will, do so, particularly when they have this case as a precedent.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit.

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Counsel for Petitioners

CERTIFICATE OF COUNSEL

I, Amy Burkett, counsel for the above named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, Subdivision 2, of the Rules of this Court.

Counsel for Petitioners

PROOF OF SERVICE

I, Amy Burkett, the attorney of record for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of November, 1972, I served copies of the foregoing Petition for Rehearing on Thomas P. Scott, the only Respondent and only other party interested herein, by mailing to Hon. Carlos B. Hill, his attorney of record, at his usual business address No. 14½ East Center, Fayetteville, Arkansas 72701, by United States Air Mail, postage fully prepaid.

Witness my signature this the 14th day of November, 1972.

Amy Burkett

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